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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1830**

Angela Brown,
Relator,

vs.

J and J Holmes, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed August 1, 2011
Affirmed
Willis, Judge***

Department of Employment and Economic Development
File No. 25438505-3

Angela Brown, Foley, Minnesota (pro se relator)

Chad Alan Staul, Wessels Sherman, Minnetonka, Minnesota (for respondent J and J
Holmes, Inc.)

Lee B. Nelson, Christina Altavilla, Minnesota Department of Employment and Economic
Development, St. Paul, Minnesota (for respondent Department of Employment and
Economic Development)

Considered and decided by Worke, Presiding Judge; Stauber, Judge; and Willis,
Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

WILLIS, Judge

On certiorari appeal from the decision of the unemployment-law judge (ULJ) that relator is ineligible to receive unemployment benefits because she was discharged for employment misconduct, relator argues that the ULJ's finding that she failed to communicate with the employer regarding her absence from work is not supported by the record. We affirm.

FACTS

J and J Holmes, Inc. employed relator Angela Brown from May 2004 until June 3, 2010, as direct-care staff. Brown began experiencing health problems due to an allergic reaction to cosmetic surgery, and took a medical leave of absence and did not work at various times between February 3 and May 19, 2010. During her medical leave Brown was required to contact her employer at least once a week to report on her medical status. J and J Holmes issued Brown three attendance-related warnings during 2010 but was unable to deliver the warnings despite several attempts to do so.

On May 17, J and J Holmes's human-resources director sent Brown a letter stating that her medical leave would expire on May 19 and that she was expected to return to work on May 20. On May 19, Brown called the HR director and requested a personal leave of absence so she could schedule surgery for her medical condition. Later on May 19, the HR director left Brown a message saying that her request for a personal leave of absence was denied. May 19 was the last time that the HR director spoke with Brown.

On May 20, Brown did not report to work or call J and J Holmes. Also on May 20, Brown's adult son had a heart attack, and Brown spent four or five days at the hospital. Brown did not call J and J Holmes until May 24, when she allegedly left messages with other staff at J and J Holmes indicating that she was still waiting to schedule her surgery and would not be returning to work. The HR director denied having ever received any calls from Brown or any information that her son had a heart attack.

On May 24, J and J Holmes sent Brown a letter stating that her medical leave of absence ended on May 19 and explaining that she did not qualify for a personal leave of absence because she had three warnings in the preceding year. The letter also directed Brown to return to work without further delay and to contact the HR director by May 28 to discuss any accommodations. Brown claims that she did not receive this letter and that her mail is sometimes not delivered to her. J and J Holmes sent Brown another letter on June 3 stating that the HR director had received no communication from Brown, and, therefore, it was terminating her employment.

Brown applied for unemployment benefits and the Minnesota Department of Employment and Economic Development determined that she was ineligible for benefits. Brown appealed the department's determination and an evidentiary hearing was held before a ULJ. The ULJ concluded that Brown was discharged for employment misconduct because she failed to report to work by May 20 and failed to communicate with her employer and, therefore, was ineligible for unemployment benefits. Brown filed a request for reconsideration with the ULJ, who affirmed the decision. This certiorari appeal follows.

DECISION

We may reverse or modify the decision of a ULJ if the substantial rights of the petitioner may have been prejudiced because the ULJ's findings, inferences, conclusions, or decision are affected by an error of law or unsupported by substantial evidence. Minn. Stat. § 268.105, subd. 7(d)(4)-(5) (2010). Substantial evidence means “(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety.” *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002).

Employees discharged for misconduct are disqualified from receiving unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2010). “Whether an employee engaged in conduct that disqualifies the employee from unemployment benefits is a mixed question of fact and law.” *Schmidgall v. FilmTec Corp.*, 644 N.W.2d 801, 804 (Minn. 2002). Whether an employee committed the alleged act is a fact question. *Scheunemann v. Radisson S. Hotel*, 562 N.W.2d 32, 34 (Minn. App. 1997). We defer to the ULJ’s credibility determinations and findings of fact. *Yswsf v. Teleplan Wireless Servs., Inc.*, 726 N.W.2d 525, 529 (Minn. App. 2007). But whether a particular act constitutes employment misconduct is a question of law, which we review de novo. *Schmidgall*, 644 N.W.2d at 804. Employment misconduct is defined as “any intentional, negligent, or indifferent conduct, on the job or off the job that displays clearly: (1) a serious violation of the standards of behavior the employer has the right to reasonably

expect of the employee; or (2) a substantial lack of concern for the employment.” Minn. Stat. § 268.095, subd. 6(a) (2010).

Brown asks that we reverse the decision of the ULJ, arguing that J and J Holmes did not inform her of the three warnings she received in 2010 and that the record does not support the ULJ’s finding that she failed to communicate with J and J Holmes regarding her absence from work. Substantial evidence, however, supports the ULJ’s conclusion that Brown engaged in employment misconduct by failing to communicate with J and J Holmes regarding her absence from work beginning on May 20.

At the evidentiary hearing, Brown testified that she had a conversation with the HR director on May 19, in which she was notified that her request for a personal leave of absence was denied and that she was expected to return to work on May 20. The record shows that Brown did not return to work on May 20, although she was physically able to do so. The record also shows that J and J Holmes sent Brown a properly addressed letter on May 24 explaining that her request for a personal leave of absence was denied based on three written warnings during the preceding year. Brown argues for the first time on appeal that she was not aware of these three warnings and, therefore, J and J Holmes should have granted her request for a personal leave of absence. We do not consider arguments first made on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Nonetheless, even if Brown was unaware of the three warnings, her failure to report to work or contact her employer after May 19 was a violation of the standards of behavior that J and J Holmes had the right to expect and displayed a substantial lack of concern for her employment.

The letter sent to Brown on May 24 directed her to report to work immediately and to call the HR director by May 28. Although testimony and phone records indicate that Brown may have left messages about her absence from work with other staff members at J and J Holmes on May 24, it is undisputed that she did not attempt to contact the HR director regarding her absence from work until after she received the June 3 termination letter. The HR director testified that she had no communications with Brown after May 19 and denied having received any calls from Brown or any information about her absence from work. The ULJ found the HR director's testimony to be more credible and persuasive than Brown's. We defer to the ULJ's credibility determinations. *Ywswf*, 726 N.W.2d at 529. Brown's claim that she did not receive the May 24 letter does not absolve her from the responsibility of contacting her employer about being absent from work. Based on this evidence, the ULJ determined that Brown had a responsibility to report to work on May 20 or follow regular procedures to be excused from work, and her failure to do so displayed Brown's lack of concern for her employment and violated the standards of behavior that J and J Holmes had the right to expect from its employees.

Generally, an employer has a right to expect its employees to work when scheduled. *Smith v. Am. Indian Chem. Dependency Diversion Project*, 343 N.W.2d 43, 45 (Minn. App. 1984). An employer may establish and enforce reasonable rules governing employee absences, and refusal to abide by these policies generally constitutes misconduct. *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 28 (Minn. App. 2007). The record shows that Brown knew that she was to report to work on May 20, that she did not report to work on or after May 20, and that she did not contact her

employer until after she received a termination letter on June 3. Because substantial evidence in the record supports the ULJ's finding that, despite warnings from J and J Holmes, Brown failed to report to work or communicate with her employer regarding her absence from work, the ULJ did not err in concluding that Brown was discharged for employment misconduct.

Affirmed.